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WAS MUTUALITY IMPORTED INTO THE AGREEMENT IN THE CASE OF UNDERWOOD TYPEWRITER COMPANY v. CENTURY REALTY CO.

In the case of the Underwood Typewriter Company v. Century Realty Company (Mo. App.), 94 S. W. Rep. 787, the realty company executed a lease which provided against subletting without first obtaining consent in writing on the back of the lease. The lessor obtained a written agreement to give its written consent to an assignment of said lease to an acceptable tenant. With the knowledge of the lessor the lessee, relying upon this promise, spent a large amount of time and labor in securing an acceptable and satisfactory tenant for the premises for the space embraced in the lease, from whom the plaintiff could have realized a profit to itself, had the lessor executed the written consent to assign the lease as it had theretofore promised. This the lessor refused to do. The majority opinion proceeded upon the theory that the primary lack of mutuality was cured by importing a sufficient and definite consideration in the shape of a tenant both acceptable and satisfactory, which the demurrer admitted, in view of the allegations in the petition. The majority opinion, by Mr. Justice Nortoni, states: "The law pertaining to the sufficiency of a consideration is satisfied if the moving party, the promisee, puts himself to inconvenience, trouble, or expense, relying upon the faith of the promise of the party against whom the promise is sought to be enforced, for in such case the inconvenience, trouble and expense will be taken to have been incurred at the instance and request of the promisor. School Dist. v. Scheidley, 138 Mo. 672-684, 40 S. W. Rep. 576, 37 L. R. A. 406, 60 Am. St. Rep. 576; Halsa v. Halsa, 8 Mo. 303-307; German v. Gilbert, 83 Mo. App. 411; Koch v. Lay, 38 Mo. 147; Webb's Pollock on Contracts, 167; 9 Cyclo. of Law & Pro. 308. In such case the law, in a spirit of justice, regards that inconvenience, trouble and expense as having been invited and entailed by the promise of the other party and therefore impliedly at his instance and request, and, the moving party having discharged his undertaking, it, therefore, affixes the mutuality of obligation and sufficiency of consideration which relates back to the inception of the agreement as against the promisor and requires him to respond as well. This is the principle, as we understand it, as will be evidenced by consulting the following authorities in point: School Dist. v. Scheidley, 138 Mo. 672, 40 S. W. Rep. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576; Laclede Const. Co. v. Tudor Iron Works, 169 Mo. 137, 69 S. W. Rep. 384; Willets v. Sun Mut. Ins. Co. (N. Y.), 6 Am. Rep. 31; South & North Ala. Ry. Railroad Co. (Ala.), 13 So. Rep. 682, 39 Am. St. Rep. 74; Muscatine, etc., Co. v. Muscatine Lumber Co. (Iowa), 52 N. W. Rep. 108, 39 Am. St. Rep. 284; Andreas v. Holcombe, 22 Minn. 339; Morgenstern v. Davis, 14 N. Y. Supp. 31; Storm v. United States, 99 U. S. 76-83, 24 L. Ed. 42; Mills v. Blackall, 11 Ad. & Ell. (N. S.) 358; Kennaway v. Trecavan, 5 Mees. & W. 501; 9 Cyclo. Law & Pro. 333; 7 Am. & Eng. Ency. Law, 2d Ed. 115; Lawson on Contracts, 2d Ed., sec. 106.

It is true that in such agreements, which at first are insufficient by reason of the want of the very essential element of every valid contract, sufficient consideration and mutuality, the promisor can, if he sees fit, revoke and recall the promise at any time prior to the promisee having moved toward its fulfillment and expended time, labor or money or inconvenienced himself thereabout, for, up to that time nothing having been done thereunder by the promisee, it will remain a nude pact and is not obligatory. Andreas v. Holcombe, 22 Minn. 339. But if the promise is permitted to stand, and, with the knowledge of the promisor, the promisee expends time, labor or money or otherwise inconveniences himself or forfeits any legal rights, relying upon the faith of the promise, the element of consideration and mutuality is thereby supplied as of the date of the agreement, and the contract at once becomes enforceable at law."

The whole question resolves itself into this: Is the fact sufficiently alleged in the petition to establish it on a demurrer, and the matter is found in the third clause of Mr. Justice Nortoni's statement of the facts as follows: "That the defendant afterwards, during the term of the lease, made its pro-

position in writing to the plaintiff to give its written consent on the back of said lease to an assignment thereof by plaintiff to an acceptable tenant when procured and produced to it by plaintiff." It is certain that this did not change the nature of the contract. It seems to us that the demurrer could only allow the admission of the fact that such an agreement was made. The determination of the matter, whether or not the tenant was a satisfactory one as a matter of law, was still with the lessor or defendant. In order to make the admission of the demurrer a binding one on the defendant the petition should say that the tenant tendered was acceptable to the defendant and accepted by it. The mere matter of the ability of the party proffered as a tenant to pay rent, could not be deemed sufficient in a case of the kind in question; the lessor reserved the right to determine the question as to whether a tenant was satisfactory and the demurrer in this case cannot be deemed to have done that for the defendant. The allegation that the defendant refused to accept the tenant is in itself an admission that the tenant was not acceptable to the defendant, the very essence of the agreement. The allegation to be an admission of a fact on a demurrer to a petition must go to the very essence of the agreement and in order to be binding in this case should have been to the effect that the tenant proffered to the defendant was acceptable to the defendant, and this is not stated in the pleadings therefore, we think the dissenting opinion of Mr. Justice Bland was correct. His conclusion was as follows: "And I will concede that if defendant had agreed to indorse its consent on the lease that plaintiff might sublet a portion of the premises to B, and plaintiff had thereafter procured B to come in as a subtenant on terms profitable or advantageous to plaintiff, the contract would be enforceable. But it seems to me the promise to let in an acceptable tenant is illusory, for the reason it is upon a condition which reserves an unlimited option to defendant, the promisor, to say who shall or shall not be an acceptable subtenant, and for this reason the contract is unenforceable. Blaine v. Knapp & Co., 140 Mo. 241, 41 S. W. Rep. 787. In Davie v. Lumberman's Mining Co., 93 Mich. 491, 53 N. W. Rep. 625, 24 L. R. A. 357, it is said that an agreement by which miners are to work at mining in a specific pit for $1.50 per ton 'as long as we can make it pay' was not of such a character as to entitle them to damages for its breach. In Vogel v. Pekoc, 157 Ill. 339, 42 N. E. Rep. 386, 30 L. R. A. 491, it is said that a contract to employ a person to work from time to time, his services to continue only as long as satisfactory to the employer, did not bind the employer to do anything; and it seems to me the contract between plaintiff and defendant does not bind the defendant to do anything. There is, therefore, a want of such certainty in the contract as to make it nonenforceable." The majority opinion shows thoughtful consideration, as do all of the opinions of the author of it, but it seems to us clear that in view of the facts in that case, as set forth in the petition, that the lines are correctly drawn by the dissenting opinion as a rule of law. The majority opinion opens the door to too much uncertainty.

NOTES OF IMPORTANT DECISIONS.

CONTRACTS—MUTUALITY.—Campbell v. American Handle Co., recently decided by the St. Louis Court of Appeals (Mo.), 94 S. W. Rep. 815, presents a case where a contract was held void for lack of mutuality. The facts were as follows: Plaintiff was to cut and deliver at defendant's factory in the city of Caruthersville, Mo., ash timber of the lengths of 6 feet and 2 inches, and 4 feet and 9 inches, and none less than 7 inches in diameter at the small end, at the price and sum of $4.50 per cord, and all ash of suitable size for saw stocks to be cut in lengths of 12 feet and 4 inches, 14 feet and 16 feet, at the price and sum of $10 per thousand feet, and that by the terms of said contract, said prices were to be paid plaintiff by the defendant for all the timber that plaintiff could cut and haul off of what is known as the Cunningham land west and south of what is known as the "King Mill Site" in Pemiscot county, Mo., from the time of making said contract until the 1st day of January, 1904; that the plaintiff, in order to prepare himself to perform his part of the contract, built roads and put up a boarding house, which he furnished, all at a great expense, and laid out other sums of money for tools necessary to enable him to carry out the contract, and that he, under the contract, cut and delivered on defendant's mill yard, a large quantity of both kinds of timber named in the contract, and that he continued to cut and deliver the timber until October 23, 1903, when the defendant forbid him and refused to let him continue to cut and deliver any more of the timber. The answer is a

general denial, a plea of payment of all sums due under the contract, and the surrender of the contract by the plaintiff for a consideration. At the close of the evidence the defendant moved the court to declare that under the law and the evidence, the plaintiff could not recover. The court refused this request, and submitted the case to a jury, who returned a verdict in favor of the plaintiff.

Upon an appeal the judgment of the *nisi prius* court was reversed. The court said in part: "The law in respect to this class of agreements, is well stated by Sanborn, Circuit Judge, in Cold Blast Trans. Co. v. Kansas City Bolt & Nut Company, 57 L. R. A. 699, 114 Fed. Rep. 77, 52 C. C. A. 25, as follows: 'But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire or take any of the articles mentioned. * * * Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder.' In Bailey v. Austrian, 19 Minn. 535 (Gil. 465), it was held that 'a contract to supply the proprietor of a foundry with all the pig iron wanted in his business until a certain date specified, was not binding because it does not bind the purchaser "to want" any quantity whatever.' 'Mutuality of contract means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound.' 7 Am. & Eng. Ency. Law (2d Ed.), 114. In Crane v. Crane & Co., 155 Fed. Rep. 869, 45 C. C. A. 96, it was held that 'an agreement by a wholesale dealer to supply a retailer during a certain time at a stated price with so much of a commodity as the purchaser might require for his trade, and which leaves it practically optional with the purchaser to increase or decrease his orders with the rise or fall of prices, as may be most to his advantage, and the corresponding disadvantage of the seller, was void for want of mutuality.'

Plaintiff was not bound under the terms of the contract to furnish any specified number of cords of bolts nor any specified number of feet of saw stocks. If he found it profitable to himself to cut and deliver all of the ash timber on the tract of land, he might do so. If, on the other hand, he found it unprofitable, he was at liberty to cease cutting and making deliveries at any time. There was, therefore, no mutuality of contract and the court should have so declared as a matter of law by granting defendant's instruction in the nature of a demurrer to the evidence."

PRIVILEGED COMMUNICATIONS APPLIED TO NEW CONDITIONS.

The domain of law is not without its suggestions. The recent immunity cases have given rise to the suggestion on behalf of a physician in Wisconsin's jurisdiction who refuses to report tubercular cases under a statute compelling such cases to be reported by physicians and others, and under a penalty if they fail to report, to take refuge under the statutory provision relating to privileged communications in order to protect his patient.

Before discussing this case a short review of the law of privileged communications as relating to physician and patient will be essential. At common law information obtained by physicians or surgeons was not privileged. They were at liberty to disclose, either in or out of court, any information they received from their patients, irrespective of the effect such disclosure would have upon their rights, reputation, or feelings of their patients. Medical persons are bound to reveal confidential communications, when called upon in courts of justice.[1] In Duchess of Kingston's trial,[2] the court held that a surgeon has no privilege, and "if a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." Statutes granting the privilege have been passed in the following states: Arizona, Arkansas, California, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin, Wyoming and the United States. The ground on which communications to physicians are privileged, is the supposed necessity of a full knowledge of the facts and secret ailments of the patient, to advise and prescribe correctly, and unless such consultations are privileged and confidential, men will be incidentally punished by being obliged to suffer the consequences of

[1] Rex v. Gibbons, 1 C. & P. 97.
[2] 20 How. St. Tr. 573.

injuries without relief from the medical art. The object of the statute is a beneficent one and rests upon principles of convenience and policy. In Edington v. Ætna Life Ins. Co.,[3] the court said: "The policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary for his treatment. Its purpose is to invite confidence and to prevent a breach thereof. Suppose a patient has a fever, or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him, testify to these matters? In doing so, there would be no breach of confidence, and the policy of the statute would not be involved. These and other cases which might be supposed, while perhaps within the letter of the statute, would not be within the reason thereof. *Cessante ratione legis, cessat et ipsa lex.*"

The court reserves the right to know somewhat of the circumstances under which the information sought to be obtained from physicians as witnesses was acquired, and the court must be able to see that it is within the policy of the statute.[4] The objection must be taken before the witness testifies, and must be claimed before the testimony is admitted.[5] The right is not sufficiently exercised by a motion to strike out the testimony. The confidence sought to be protected must be given to a professional physician during a consultation for curative purposes. Any physician, surgeon or licensed practitioner (as defined in some states), belonging to any branch or school of medical science, recognized as such by the reputable medical profession, is entitled to the privilege. The relation must be that of physician and patient,[6] but employment by patient is not necessary.[7] The privilege is for the protection of the patient only and not for the physician.[8] It is a personal one.[9] The privilege may be claimed by the patient or his personal representative,[10] or the beneficiary in a policy of insurance on the life of the patient, or the assignee of a beneficiary.[11]

It is apparent from the foregoing that the patient may waive the privilege whenever he sees fit to do so.[12] The right to waive the statutory privilege is not dependent upon any statute expressly granting the waiver.[13] A plaintiff waives his privilege when he, in a suit for personal injuries, testifies without reservation whatever as to his injuries and their effect upon him, and to exclude the testimony of his physician as to what he learned of plaintiff's condition, is error.[14] The statements in the proofs of death furnished by the beneficiary are a waiver of the statutory privilege only in so far as such statements refer to the subject matter claimed as privileged.[15] A party waiving the privilege on a first trial may claim it on the second trial of the case,[16] but the New York court held otherwise in McKinney v. Grand Street R. R.[17] The extent of the communication and professional information include all facts which it is necessary for a physician to know in order that he may treat and advise his patient intelligently and correctly, and all such information obtained by a physician from his patient while he attended him in a professional capacity, is within the statute, if it was necessary to enable him to act, but it must be shown that it was such as was necessary to enable him to act in that capacity.[18]

[3] 77 N. Y. 564.

[4] Edington v. Ætna Life Ins. Co., *supra*.

[5] Breisenmeister v. Supreme Lodge, 81 Mich. 525.

[6] People v. Koerner, 154 N. Y. 355; Fisher v. Fisher, 129 N. Y. 654; Clark v. State, 8 Kan. App. 782; Weitz v. Mound City R. Co., 53 Mo. App. 39.

[7] Renehan v. Dennin, 113 N. Y. 573, 57 Am. Rep.

[8] Springer v. Byram, 137 Ind. 15, 45 Am. St. Rep. 159.

[9] Breisenmeister v. Supreme Lodge, etc., *supra*.

[10] Heaston v. Simpson, 115 Ind. 62, 7 Am. St. Rep. 417.

[11] Edington v. Ins. Co., 67 N. Y. 185; Breisenmeister v. Supreme Lodge, etc., *supra*.

[12] Morris v. Morris, 119 Ind. 341.

[13] Boyle v. Northwestern Mut. Relief Assn., 95 Wis. 312; Kenyon v. Mondovi, 98 Wis. 50.

[14] Treaner v. Manhattan R. Co., 16 N. Y. Supp.

[15] Breisenmeister v. Supreme Lodge, etc., 45 N. W. Rep. 977.

[16] Grattan v. Ins. Co., 92 N. Y. 274; Breisenmeister v. Supreme Lodge, etc., *supra*.

[17] 104 N. Y. 352.

[18] Kenyon v. Mondovi, 95 Wis. 53, 73 N. W. Rep. 314; Renehan v. Dennin, 103 N. Y. 573; People v. Schuyler, 106 N. Y. 298; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250; Mutual Ben. Life Ins. Co. v. Robison, 19 U. S. App. 266; Adreveno v. Mutual Reserve Fund Life Assn., 34 Fed. Rep. 870; Collins v. Mack, 31 Ark. 693; Lessah v. Crocker Estate Co., 119 Cal. 442; Black's Estate, 132 Cal. 392, 64 Pac. Rep. 695; Freel v. Market St. Cable R. Co., 97 Cal. 40; Redfield's Estate, 116 Cal. 644, 48 Pac. Rep. 794; Colorado Tool, etc., Co. v. Cummings, 8 Colo. App. 541; Penn. Co. v. Marion, 123 Ind. 415, 23 N. E. Rep. 973; Springer v. Byram, 137 Ind. 15, 45 Am. St. Rep. 159; Garley v. Park, 135 Ind. 440; Ætna Life Ins. Co. v. Denning, 123 Ind. 384; Excelsior Mut. Aid Assn. v. Riddle, 91 Ind. 81; Masonic Mut. Assn. v. Beck, 77 Ind. 203, 40 Am. Rep. 295; Bower v. Bower, 142 Ind.

The information may come to the physician in the form of speech or writing, in audible or visible signs, or it may be derived from observation or inspection by means of physical examination, or from statements of others present at the time. The presumption is that information so imported was for the purpose of enabling the physician to prescribe for the patient.[19] In Edington v. Mutual, etc., Ins. Co.,[20] evidence was offered to show by certain physicians that the life insured was afflicted with disease, and it was urged that the testimony they would give was based on knowledge which they obtained solely from their attendance upon him as physicians, and not from any information received from him." It was excluded, and Miller, J., speaking for the court upon appeal, holds that it was rightfully rejected, and, with other words to the same effect, says: "The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe, is not well taken, as it must be assumed from the relationship existing that the information would not have been impartial except for the purpose of aiding the physician in prescribing for the patient. When the statute speaks of information, it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statements of others who may surround him at the time, or from observation of the appearance and symptoms. Even if the patient could not speak, the astute medical observer could readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute."

It is competent for a physician to testify that he is the family physician of a patient, and the number and dates of his professional visits.[21] He may also testify as to what was said in respect to the disease where one comes to him to procure medicine for another.[22] Where a physician attending professionally a person who had taken poison, acquired information, he may testify as to such information,[23] and where no professional relation existed a physician attending a patient may testify to his knowledge concerning him derived from observation.[24] So a physician who has prescribed for a person and has also observed him otherwise than professionally, may give an opinion as to his mental condition upon facts observed while not acting professionally, excluding from his mind what he observed while in attendance upon such person.[25] A physician who has attended a person in a professional capacity is competent to answer hypothetical questions put to him, but he must be directed to lay aside all knowledge or information received as a physician.[26] So where a physician has made an affidavit to facts derived in a professional capacity, at the instance of the patient, he may be compelled to make another upon the same subject.[27] Where two physicians in their professional capacity are in attendance on a patient at the time he was injured, and in a suit the question of the nature and extent of his injuries is in issue as they appeared at the time when the physicians were called and the patient calls one of them as a witness, the defendant may call the other.[28]

A privileged communication made in a physician's presence, cannot be disclosed by him to his partner.[29] Neither can an inspection and discovery of a physician's account books be ordered, if they contain privileged information concerning his patient.[30] So cannot a physician's prescription for his patient

194; Raymond v. R. G., 65 Iowa, 152, 21 N. W. Rep. 495; C. F. S. & M. R. Co. v. Murray, 55 Kan. 336, 40 Pac. Rep. 646; Papin v. Cole, 113 Mich. 82, 71 N. W. Rep. 455; Cooley v. Foltz, 85 Mich. 47, 48 N. W. Rep. 176; Breisenmeister v. Supreme Lodge, etc., 81 Mich. 525; Jones v. Preferred Banker's Life Assn. Co., 120 Mich. 211; Camplan v. North, 39 Mich. 606, 33 Am. Rep. 433; Heniman v. Stowe, 57 Mo. 93; Blair v. Chicago, etc., R. Co., 89 Mo. 334; Territory v. Corbett, 3 Mont. 50; Davis v. Supreme Lodge, etc., 165 N. Y. 159; Hewitt v. Paine, 21 Wend. 79; Nelson v. Oneida, 156 N. Y. 219, 50 N. E. Rep. 802; Green v. R. Co., 171 N. Y. 201, 63 N. E. Rep. 958; Hoyt v. Hoyt, 112 N. Y. 493; Matter of Coleman, 111 N. Y. 220; Wells v. New England Mut. Life Ins. Co., 187 Pa. St. 166; Shafer v. Eau Claire, 105 Wis. 339; McGowan v. Supreme Ct., etc., 104 Wis. 173.

[19] Grattan v. National Mut., etc., Ins. Co., 15 Hun, 74; Edington v. Mutual, etc., Ins. Co., 67 N. Y. 185; Delliter v. Home Life Ins. Co., 69 N. Y. 256; Cohen v. Continental Life, 69 N. Y. 780.

[20] 67 N. Y. 185.

[21] Breisenmeister v. Supreme Lodge, etc., *supra*.

[22] Babcock v. People, 19 Hun, 347.

[23] Pierson v. People, 18 Hun, 239, 79 N. Y. 424.

[24] Edington v. Ins. Co., 77 N. Y. 564.

[25] Fisher v. Fisher, 129 N. Y. 154.

[26] Meyer v. Standard L. & A. Ins. Co., 8 Han's App. 74.

[27] Mason v. Libbey, 2 Abb. N. C. 137.

[28] Morris v. New York, etc., R. Co., 148 N. Y. 88.

[29] Raymond v. R. R. Co., 65 Iowa, 152, 21 N. W. Rep. 495.

[30] Mott v. Consumers' Ins. Co., 2 Abb. N. C. 143.

or its ingredients be introduced or explained in evidence.[31] The section relating to privileged communications between physician and patient in the Wisconsin statutes reads as follows: "No person duly authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physicion, or to do any act for him as a surgeon.[32] In Boyle v. Northwestern Mutual Relief Assn.,[33] the court put the following construction on the statute and said: "The disclosure by a physician of information acquired in his professional character, in attending on a patient, when not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse. The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpretation, in order to carry out its evident beneficial purposes. It provides that the physician shall not be compelled to disclose any information, etc., acquired in his confidential relations with his patient. For whose benefit was the provision intended? Clearly, for the benefit of the patient, whose interest, reputation, and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a witness the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom it was quite unimportant, from the consequences of such disclosure, and shows that the provision that the physician shall not be compelled to make the disclosure as a witness renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without his consent."

I have indulged in this long quotation from this case in order to give a complete view of the law as interpreted in the Wisconsin jurisdiction and as applicable to the case mentioned in the beginning of this article, also as showing its relation to the provision of the statute passed in 1905, which reads as follows: "It shall be the duty of every physician or person, or owner, agent, manager, principal or superintendent of each and every public or private institution or dispensary, hotel, boarding or lodging house, in any such city, to report to the department of health thereof, in writing, or to cause such report to be made by some proper and competent person, the name, age, sex, occupation and latest address of every person afflicted with tuberculosis, who is in their care, or who has come under their observation, within one week of such time. It shall be the duty of every person sick with this disease, and of every person in attendance upon any one sick with this disease, and of the authorities of public and of private institutions or dispensaries, to observe and enforce all the sanitary rules and regulations of such health department for preventing the spread of pulmonary tuberculosis.[34] This provision is sweeping in its effect. Statutes relating to infectious and contagious diseases of the nature of measels, scarlet fever, typhoid fever, small pox, etc., have been held constitutional, *i. e.*, an ordinance passed by the common council of a city requiring any physician having a patient within the city sick with an infectious disease, to forthwith report the fact to the mayor or to the clerk of the board of health, with the name of the patient and the street and number of the house, under a penalty not exceeding fifty dollars. Held that this ordinance was not invalid as conflicting with the constitutional rights of the citizen and that the legislature had power to authorize its enactment by the common council.[35]

It is contended, however, that the nature of tubercular diseases is such that to make publicly known the patient's name, etc., would cause unnecessary hardship for him, for the reason that a strong popular prejudice exists against persons afflicted with the disease, but that to compel strict sanitary regulations is just and proper.

What bearing the following decisions may have upon the case is questionable, yet there

[31] Nelson v. Nederland Life Ins. Co., 110 Iowa, 600.
[32] Rev. Statute of Wis. 1898, § 4075.
[33] 95 Wis. 312.
[34] Laws of 1905 (Wis.), ch. 192, § 4.
[35] State v. Werden, 56 Com. 216.

is a conflict in the light of these decisions, irrespective of the question of testifying in court, between the statute relating to privileged communications and the one relating to reporting contagious diseases. A physician cannot be compelled to disclose the disease or the nature of the disease, for this was privileged under the statute.[36] Neither can a physician testify as to the nature of the disease with which the patient was afflicted or whether he had advised the patient of its nature.[37] So a physician cannot testify, over plaintiff's objection, for what ailment he treated patient prior to the accident; the information is privileged under statute,[38] and in Briggs v. Briggs,[39] the court said: "Every reputable physician must know of the existence of the statute; and he must know from its very tenor as well as from the obvious reasons underlying it that it is not at his option to disclose professional secrets. A rule is prescribed which he is not to be allowed to violate; a privilege is guarded which does not belong to him but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself.

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[36] Sloan v. The New York Central R. R. Co., 45 N. Y. 125.
[37] Nelson v. Netherland Life Ins. Co., 110 Iowa, 600.
[38] Lamminan v. Detroit Citizens' Street Railway Co., 112 Mich. 602.
[39] 20 Mich. 34.

WATERS AND WATER-COURSES—EVERY CONSUMER OF WATER HAS RIGHT TO ENFORCE PROVISIONS OF WATER COMPANY'S FRANCHISE.

INDEPENDENT SCHOOL DIST. v. LE MARS CITY WATER & L. CO.

Supreme Court of Iowa, June 3, 1906.

A city granted to a person a franchise for a waterworks system. The franchise fixed the maximum water rates to be charged for furnishing water for hotels, restaurants, boarding houses, water-closets, etc., and provided that water should be furnished to the schools in the city free of charge. At the time of the granting of the franchise there was no sewer system in operation in the city, but subsequently such system was constructed. Held, that the owner of the franchise was required to furnish water for the sewer system at the charges specified, and to furnish water for the water-closets, etc., in the schools of the city free of charge.

The statute granting a city power to authorize a private person to construct waterworks, and giving the city power to fix rates by contract, makes every consumer of water privy to the contract to such an extent as to enable him to enforce his rights under the contract.

An independent school district, coextensive with the boundaries of a city, may maintain mandamus to compel a holder of a franchise to maintain a system of waterworks in the city to comply with the ordinance granting the franchise and requiring the furnishing of water to the schools free of charge.

SHERWIN, J.: The plaintiff is now, and was on the 1st day of October, 1888, a school corporation organized under the laws of this state, with territory coextensive with the boundaries of the city of Le Mars, a municipal corporation of the second class. On the 1st of October, 1888, the city passed an ordinance entitled "An ordinance to provide for supply of water for the inhabitants of Le Mars, Iowa, for domestic use, for fire protection, and for other purposes." The ordinance gave to J. M. Dunn, his heirs and assigns the exclusive right for the term of 25 years, to use the streets, alleys and public grounds of the city for the purpose of erecting and maintaining a system of waterworks. The ordinance provided for the acceptance of its conditions in writing within 30 days after its passage, and that when accepted, it should constitute a contract between the city and Dunn, his heirs and assigns. The conditions of the ordinance were accepted in writing by Dunn within the time required thereby. The ordinance required Dunn to erect a water plant and to lay at least three miles of water mains within a short time, and provided for the extension of the mains and service as the increasing needs of the people of the city should demand. Section 14 thereof also provided as follows: "Said grantee, his heirs or assigns, shall during the existence of this franchise perform each and every condition specified in this ordinance." Section 15 of the ordinance is as follows, so far as it is material to the present inquiry: "The following shall be the maximum water rates to be charged annually by said grantee, his heirs or assigns, for the use of water until changed as hereinafter provided." Following this is a long schedule enumerating the service for which the maximum charges are fixed by the section, including therein public and private bath tubs, hotels, restaurants, boarding houses and public and private water closets and urinals. Churches and schools were designated therein as free. At the time the ordinance was passed the plaintiff owned and used three school buildings which have ever since been furnished free water for drinking, cleaning and heating purposes by Dunn and his successors. In 1904 the plaintiff erected a high school building on the site formerly occupied by one of the three old buildings. The new building is modern and is provided with the usual and necessary water closets and urinals which are connected with the sewer system now in use in the city. After the completion of the building the plaintiff applied to the defendant for a sufficient supply of water for said building free of charge, and the defendant refusing to so furnish it, this action was commenced.

The petition states the plaintiff's case substantially as set out herein. The answer alleges that there was no sewer system in Le Mars when the ordinance was passed, and that the water closets, urinals and heating plant placed in the new building were not contemplated by the plaintiff at that time. It further alleges that the city had no power to enact an ordinance requiring the grantee therein to furnish water to churches and schools without compensation therefor, and that the requirement is contrary to chap. 10, tit. 4, of the Code of 1873, and contrary to the provisions of title 5 of the Code of 1897. The answer further pleads that such requirement is void because in contravention of the provisions of the Constitutions of the United States and of this state, declaring that no person shall be deprived of * * * property without due process of law, nor shall private property be taken for public use without just compensation, nor shall any person be denied the equal protection of the law. This provision of the ordinance is also said to be violative of the Constitution of this state which requires that all laws of a general nature shall have a uniform operation. The demurrer raises the legal sufficiency of the several defenses plead. Under Sec. 471 of the Code of 1873, the city of Le Mars had the power to erect waterworks itself, or to authorize the erection of the same by a person or corporation. Section 473 provided: "When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to enure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water such water rent as may be agreed upon between said person or corporation so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works to supply said city or town with water for fire purposes," etc. This statute gave the city of Le Mars the right to contract not only for water for municipal purposes, but for the rate which should be charged other consumers thereof. The express power thus granted was to be exercised by the city in the interests and for the benefit of the inhabitants of the city who might wish to become patrons of a water plant erected by an individual or a corporation, and included within its purview all consumers, whether such consumers might be individuals or corporations, secular or religious. That the ordinance and its acceptance by Dunn constituted a contract binding him and the city, as stated therein, cannot be successfully questioned. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. Rep. 1081. At the time the contract was entered into the plaintiff occupied territory coextensive with the boundaries of the city of Le Mars. It was and is a body corporate with power to hold property and make contracts. The city should be, and doubtless is, as deeply interested in its financial welfare as it is in the welfare of any other corporation or any individual dwelling within its corporate limits, and we know of no sound legal reason why the city could not contract in its behalf as well as in behalf of other corporations and of individuals. If the contract had named a definite sum that should be paid for water by schools and churches, it would hardly be contended that the city had no authority to make such a contract. If it be true, then, that the plaintiff was and still is entitled to the benefit of the contract made by the city, it must follow that the amount to be paid for water thereunder is of no importance, and that a contract to furnish it without charge is not beyond the power of the city, nor is such agreement without consideration, for the contract or franchise is to be considered as a whole, and the stipulation to furnish free water to schools and churches is clearly one of the considerations for the franchise. 1 Farnham on Waters, § 159 (Ed. 1904); Boise City v. Water Co. (Idaho), 39 Pac. Rep. 562; M. E. Church v. Water Co., 20 Ohio Cir. Ct. Rep. 578.

The appellees say that, conceding the plaintiff has the right under the ordinance to use water for drinking and cleaning purposes without charge, it has no right thereunder to use it for water closets, urinals and for heating purposes without paying for the same. There is trouble with this contention. In the first place, while there was no sewer system in operation in Le Mars when the ordinance was passed and the rates agreed upon, it was clearly contemplated by the schedule of rates and by other parts of the ordinance for it specifically fixes the rates for water closets, urinals and other services which common knowledge and experience demonstrate are not practicable or demanded until a sewer system is provided. In the second place, the plaintiff's use of the water was not limited by express language or by implication, and if the parties contemplated that the future growth and improvement of the city would demand water closets and urinals in public and private buildings, there is no reason for saying that the public school buildings were excluded by implication from such consideration. It may as well be said that because there was no sewer at the time, the rate fixed for such conveniences is not to govern. It is further contended that there is no privity of contract between the parties, and therefore that the plaintiff has no right to maintain this action. If this be true, it is plain that no inhabitant of the city may maintain an action to compel a private water company to comply with its contract with the city to furnish the inhabitants thereof water for domestic purposes, and we do not think that such a rule can possibly obtain. The statute granting the city power to authorize private persons or corporations to construct waterworks and giving the city power to fix the rates by contract, impliedly, at least, makes every consumer of water thereunder privy to the contract to such an extent as to enable him to enforce his rights under the contract. Otherwise the individual would be with-

out redress unless the city acted in his behalf, and its authority so to do may well be questioned under the rule that every action must be prosecuted by the real party in interest. It cannot be denied that a franchise granted under this statute imposes the public duty of furnishing water to all persons whose property is reached by defendant's pipes. Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265, 29 L. Ed. 510; New Orleans Gaslight Co. v. Louisiana Light & H. P. Mfg. Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. Ed. 516; Haugen v. Albina Light & Water Co. (Oreg.), 28 Pac. Rep. 244, 14 L. R. A. 424.

The contract having been made for the benefit of the plaintiff, it may surely maintain an action of mandamus to compel its performance. Farnham on Waters, §§ 159d, 160. See also German State Bank v. Water & Light Co., 104 Iowa, 717, 74 N. W. Rep. 685; Daily v. Minnick, 117 Iowa, 562, 91 N. W. Rep. 913, 60 L. R. A. 840; Tweeddale v. Tweeddale (Wis.), 93 N. W. Rep. 440, 61 L. R. A. 509; Dean v. Walker (Ill.), 47 Am. Rep. 467. This holding is not in conflict with the cases cited by the appellees in which this court held that water companies were not liable to individuals for damages by fire. See Davis v. Water Works, 54 Iowa, 59, 6 N. W. Rep. 126, 37 Am. Rep. 185; Becker v. Water Works, 79 Iowa, 419, 44 N. W. Rep. 694, 18 Am. St. Rep. 377, and Van Horn v. City of Des Moines, 63 Iowa, 447, 19 N. W. Rep. 293, 50 Am. Rep. 750, where a recovery was asked of the city. The constitutional questions raised by the answer have been argued with much earnestness, but we are unable to see how they affect this case. If the city were now attempting to establish the rate contended for by the appellant, there would be force in the appellee's several points, but such is not the present case. The contract entered into by the city and Dunn was one they both might lawfully make, and having made it, both parties and their privies are bound thereby. The plaintiff asks nothing more than the enforcement of a legal contract, and this, we think, it is entitled to on both reason and authority.

The judgment is reversed and the case remanded for proceedings in harmony with this opinion. Reversed.

NOTE.—*A Contract or Franchise is to be Considered as a Whole, and a Stipulation to Furnish Free Water to Schools and Churches is Clearly One of the Considerations of the Franchise.*—The principal case is selected, not so much because of the difficulty of the legal proposition, but because of the probability that the questions discussed are likely to frequently recur. We believe the modern tendency of the courts is more and more towards regarding contracts as a whole. We believe in the wisdom of such a policy. It gives greater sanctity to contracts.

The stipulation in the contract in the principal case to furnish free water to churches and schools is an important consideration. Where there was competition in the bidding for the contract, an offer to furnish free water for the churches and schools might have been the very reason for the acceptance on the part of the city of the bid in question. Or if it was a requirement on the part of the city the effect would in no wise be different. This stipulation was an important element in the contract, and, therefore one of the considerations. It could not be depriving the water company of its property without due process of law, neither the denial of equal protection of the laws, for the stipulation was duly considered and accepted as a part of a contract properly regarded as a whole.

In Farnham's Waters and Water Rights, sec. 159d, the learned author says: "The contract for a water supply may provide that the water for certain specified purposes shall be furnished free, in consideration of the franchises granted to the company, or the company may be required to do so by statute, and when such a contract is made the question what uses are within the terms of the contract, is a matter of construction. If the contract is to furnish water free to public buildings of the city, buildings of other public institutions within the city will not be included." That is to say that "where the school district of a city constitutes an independent corporation, its school buildings are not included in a contract by which a water company agrees with the city to supply water free of charge 'for all public buildings and offices of said city.'" National Water Works Company v. Kansas School Dist., 23 Mo. App. 227.

But it is held that school buildings are within the enumeration of public buildings of the city, and that an "act authorizing district school organizations in cities, which intends nothing more than the separation of the control of the public schools from general municipal affairs, and does not transfer the school property to such district, does not render the school board and the city such distinct corporations as to exclude school buildings from a water supply which, by ordinance, a water works company was to supply water to the 'public buildings and offices of the city.'" National Water Works Company v. School Dist. 7, 4 McCrary, 198, 48 Fed. Rep. 523; 1 Farnham on Waters and Water Rights, sec. 159d, 833, note. But where a water company contracts to supply certain wards of a city, and maintain the same rates and assessments as does the municipal corporations in other wards, and the subject of exemptions is considered and provided for in the contract without any inclusion therein of schools and school districts in those wards, they will be liable for assessments equal to those charged by the municipal corporation before it placed schools in the exempt class. St. Clair School Dist. v. Monongahela Water Co., 166 Pa. 81, 31 Atl. Rep. 71, reversing School Board v. Monongahela Water Co., Pa. Co. Ct. Ct. 329. When certain hydrants are specified it means those hydrants and no others. Kingston v. Kingston Water Works Co., 19 U. C. Q. B. 490; Boise City v. Artesian Hot and Cold Water Co. (Idaho), 39 Pac. Rep. 562.

It was held in the case of New Orleans v. New Orleans Water Co., 36 La. Ann. 432, that a provision in the charter of a water works company, that the latter shall furnish water free of charge for the use of all public buildings, for the extinguishment of fires and other public purposes, in consideration whereof the company is to be exempt from taxation, does not make such exemption the sole consideration of the company's obligation to supply water, but the consideration embraces all the valuable privileges conferred by the charter; so that if the city collects taxes from the company, there is but a partial failure of consideration, and only to the extent of the amount of the tax. The company, on payment of the

taxes, can recover of the city an equal amount for water furnished. West Troy Water Works Company v. Green Island, 32 Hun, 530. See San Francisco v. Spring Valley Water Works, 48 Cal. 493; Spring Valley Water Works v. San Francisco, 52 Cal. 111. These cases present most of the features which are likely to arise in this class of cases under the particular phase we have had under discussion.

JETSAM AND FLOTSAM.

WHAT IS LAW.

Law governs the sun, the planets, and the stars. Law covers the earth with beauty, and fills it with bounty. Law directs the light, and moves the wings of the atmosphere; binds the forces of the universe in harmony and order, awakens the melody of creation, quickens every sensation of delight, molds every form of life. Law governs atoms, and governs systems. Law governs matter, and governs thought. Law springs from the mind of God, travels through creation, and maks all things one. It makes all material forms one in the unity of system. It makes all minds one of the unity of thought and love.—Tappan.

Coke tells us that law is the "perfection of human reason;" Burke, that it is "the pride of the human intellect;" "the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns:" "the most excellent, yea, the exactness of the sciences;" and the eloquent Hocker, that "her seat is the bosom of God, her voice the harmony of the spheres; all things in heaven and on earth do her homage—the least as feeling in her care, the greatest as not exempt from her power." But we know that, if it be the purest of reason, the exactness of the sciences, its administration is not always intrusted to the severest of logicians or the exactest of scientists. We know that the great, the crowning glory of "our noble English common law" is its uncertainty, and therein lies the emolument and pleasurable excitement of its practice.

THE SIGNIFICANCE OF JUSTICE BROWN'S RETIREMENT.

Henry Billings Brown, appointed by President Harrison on Dec. 23, 1891, to succeed the late Justice Samuel F. Miller, has retired into private life after an honored service of more than fifteen years in the highest court of the nation.

We do not wish at this time to undertake an estimate of Justice Brown's judicial work and worth—it will be generally conceded that it has been of a high average quality—but we desire to emphasize a thought which is suggested by his withdrawal from the bench, to wit, its effect upon the temper, complexion and personnel of the court and the great importance that attaches to the personality of his successor.

It is well known that in several of the great causes that have come before the court in recent years the decision has been rendered by a five-to-four vote. We refer especially to decisions under the Sherman anti-trust law and the insular cases. In every one of these cases Justice Brown was found ranged on the majority side in favor of a most liberal construction of the constitution for the purpose of upholding the governmental authority. This was the case in the three five-to-four decisions under the Sherman law—the Trans-Missouri Traffic Ass'n case (1897), 166 U. S. 290, the Joint Traffic Ass'n case (1898), 171 U. S. 505, and the Northern Securities case (1904), 193 U. S. 197. So, too, Justice Brown was with the majority in the celebrated Lottery Case (1903), 188 U. S. 321, a majority of one decision, which is generally regarded as going to the limit in upholding congressional legislation under the commerce clause of the constitution. Again, the justice was with the majority in the famous case of Brown v. Walker (1896), 161 U. S. 591, wherein he delivered the opinion holding that the act of congress compelling a witness to answer by giving him a legislative pardon against future prosecution satisfied the requirements of the Fifth Amendment, Justices Shiras, Gray, Field and White dissenting. In this connection it is interesting to recall that Justice Brown also wrote the majority opinion in the late cases of Hale v. Henkel and Hale v. McAlister, 201 U. S. 43, holding that a corporation has no privilege against self-incrimination under the Fifth Amendment.

In the first of the Insular Cases, De Lima v. Bidwell, 182 U. S. 1 (1900), Justice Brown delivered the opinion of the five majority justices, holding that after the ratification of the treaty of peace with Spain, Porto Rico was not a "foreign country" within the meaning of the Dingley Act, and that the duties were illegally exacted. In the first Dooley Case, 182 U. S. 222(1900), Justice Brown also wrote the opinion of the court, in which the majority concurred, holding that duties paid in Porto Rico after the ratification of the treaty and prior to the Foraker Act, were illegally exacted. So in the second Dooley case, Justice Brown again delivering the opinion of the five majority justices, held that a tariff upon merchandise going into Porto Rico from the United States was not a duty on an article exported from the United States, as it was not exported to a foreign country. 183 U. S. 151 (1901). In Dounes v. Bidwell, 182 U. S. 244 (1900). Justice Brown was again with the majority, holding that congress had a right to impose a tariff on goods brought from Porto Rico (the Foraker act did so) since it "is not a part of the United States within that provision of the constitution which declares that all duties, imposts and excises shall be uniform throughout the United States." Justices White, Shiras, McKenna and Gray concurred, Justices Fuller, Harlan, Brewer and Peckham dissenting. There was no opinion of the court, although Justice Brown announced the judgment of the court that the Foraker Act was constitutional. It was of this case that Mr. Dooley made his witticism that "Mr. Justice Brown delivered the opinion of the court from which only eight of the justices dissented."

It is also instructive, as illustrating our point, to observe Justice Brown's attitude in the Income Tax Cases, another famous five-to-four decision. In the original decision, holding that the tax on lands as income from real estate was invalid as a direct tax, Justice Brown was with the majority. 157 U. S. 429 (1895). On reargument the majority held the tax on personal property and income thereof was likewise a direct tax, and that the whole scheme of the income tax provision of the act was void because not apportioned according to representation. 158 U. S. 601 (1897). Justice Brown dissented, holding "that clause of the constitution has no application to taxes which are not capable of apportionment according to population."

This review shews sufficiently well, we think, that Justice Brown has been a consistent supporter of national authority and has upheld the broad assertion

of its powers in those celebrated decisions within recent memory which have been characterized by close divisions. In this view it becomes highly important to know who will be his successor. For recognizing the immeasurable influence of the supreme court in shaping governmental policies, the question is fraught with great significance. President Roosevelt had the same problem before him when Justice Gray died in 1902. He chose Justice Holmes after great deliberation. Yet, by some irony of fate, in the first great cause of vital moment to the government and in the success of which the president was intensely interested, the Northern Securities Case, Justice Holmes was found on the side of the minority, with Justices White, Brewer and Peckham, holding that the combination alleged was not within the Sherman act. The recollection of this experience will give the president great pause in choosing Justice Brown's successor. We have no question whatever that he will select a man whose judicial opinions and conduct have shown him to be the most liberal of liberal constructionists. The profession looks forward to the choice with great expectancy, realizing that the personality of Justice Brown's successor is fraught with momentous consequences to the future of the country.—*National Corporation Reporter.*

BOOK REVIEWS.

THE LAW OF AUTOMOBILES.

The law of automobiles is of growing importance and is likely to continue to be for a long time to come. The appearance of a new means of transportation, the automobile, brings with it certain peculiarities which has required legislation to conform it to the rights of the public. There has been already enough judicial expression with reference to both the rights of the public and also to the rights of the operator and owners of automobiles, both in England and America, to give rise to a demand for such a work as Mr. Xenephon P. Huddy, has produced. This work, as the author says, is compiled for the use of the layman, lawyer, and judge and contains an accurate compilation of all the state automobile laws in the United States, and also the English Motor Car Act, as well as all the decisions rendered upon the subject up to the date of its publication.

The author treats the subject as follows: 1. Definitions and General Considerations. 2. Historically. 3. The Nature and Status of Automobiles, which covers the complete treatment of the position of the motor vehicle in law, and its comparative relation to other vehicles, such as street cars, carriages drawn by horses and other means of transportation. 4. A large number of cases are cited and the decisions thereof set out, many of which decisions are directly concerning the automobilist's right on the avenues of travel. 5. Registration and Licensing. 6. It covers questions of Negligence, Law of the Road, Specific Statutory Provisions, Duties of Travelers, Duties of Pedestrians, Duties of Animal-drawn Carriages, Rights and Liabilities of Parties, Speed, etc. 7. This chapter alone is worth the price of the book. It will prove invaluable to the motorist, his attorney and the court in deciding disputed questions of speed where there exists conflicting testimony. It also covers the subject of Interstate Motoring Licenses and Legislation, the Legal Aspect of Motoring, and the English Motor Car Act. It purports to be a complete work on the subject and gives all the important decisions to date.

We take great pleasure in commending this work to our readers. It is contained in 389 pages, well bound in buckram, and published by Matthew Bender & Co., Albany, New York.

MOORE ON CARRIERS.

The laws relating to carriers are of growing interest because of the multitude of decisions with regard to them and the constantly increasing business of the courts pertaining to them. The rights, duties and liability of common carriers in their relationship to shippers and travelers, and their regulation by statutory enactments is of first importance, because the common carrier is the great factor of the business world. This new treatise on the Law of Carriers, by Mr. Dewitt C. Moore, of the Johnstown, New York, bar, comes in opportune time and satisfies a long felt need. The work is thoroughly done, and is complete enough to take in the railroad rate act of 1906. The table of cases examined is voluminous, showing the vast amount of work done by the author.

He says his chief aim has been to furnish suitors with a practical guide in this class of litigation by as full a presentment as possible of the established principles and rules governing the various and varying phases in which controverted questions have been and may be presented for judicial adjustment. The decisions and rulings in different jurisdictions and the reasons therefor, so far as practicable, have been set forth, and the latest as well as the earliest authorities in the different states are cited and conveniently arranged. Our examination of the chapters bears out this statement, better even, than the array of authorities cited and examined, and gives character to the statement that the task undertaken was a laborious one on this account. There is no question but that this work may be found of great value to every lawyer and should be in every lawyer's office. The citations are accurate. We read with great interest the chapter on conversion by carriers. The general principles are well wrought out in this chapter, and are of much more importance than the length of the chapter would indicate without a thorough examination. We take great pleasure in commending to the profession this most comprehensive and useful work on the law of carriers extant.

It is well bound in buckram and contained in one volume of 1044 pages, and published by Matthew Bender & Co., Albany, N. Y.

HUMOR OF THE LAW.

Not long since a misdemeanor case came up before a Tennessee justice of the peace who coming from outside the ranks of the legal profession and having just taken his seat, was rather unfamiliar with court-room procedure. The counsel for the defendant let loose a great amount of lurid oratory in endeavoring to show that there was no case against his client, and finally said:

"I move, your honor, that the defendant be discharged at the cost of the county."

There was no prosecuting attorney, and when the defendant's counsel took his seat there was silence for a moment, all waiting for the next step. The justice looked inquiringly about the room and at last asked:

"Do I hear any second to the motion?"

If a man would give another an orange he would merely say: "I give you this orange;" but when the transaction is entrusted to the hands of a lawyer to put in writing he adopts this form: "I hereby give, grant and convey to you all and singular my estate and interest, right, title, claim and advantage of and in the said orange, together with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, or otherwise eat the same orange, or give away the same, with or without its rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter, or in any other deed or deeds, instrument or instruments, of what nature or kind soever to the contrary in any wise notwithstanding."—*Chicago Law Journal.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABATEMENT AND REVIVAL—Injury to Property.—Where the owner of a house was killed in a casualty which destroyed the house, whether the cause of action for injury to and destruction of the house survived to her executor or heir depended on whether the injury was committed before or after her death:—Mast v. Sapp, N Car., 53 S. E. Rep. 350.

2. ACCIDENT INSURANCE—Bodily Infirmity or Disease.—An exemption in an accident policy from liability for death resulting from bodily infirmity or disease held not to include bacterial septicæmia immediately following an accidental injury.—Cary v. Preferred Acc. Ins. Co. of New York, Wis., 106 N. W. Rep. 1055.

3. ACCOUNT—Sufficiency of Complaint.—A complaint praying reformation of a bond, held to state a cause of action for equitable relief in the nature of an accounting.—North Side Loan & Building Soc v. Nakielski, Wis., 106 N. W. Rep. 1097.

4. ADOPTION—Rights as Heir.—Where husband adopts a child with a provision that, if she remans with them until she becomes 18 years of age, she shall be entitled to the interest of a child in his estate, the contract must be enforced in subordination to the rights of the widow in her husband's estate which he cannot impair.—Middleworth v. Ordway, 98 N. Y. Supp. 10.

5. ADULTERY—Evidence.—In a prosecution for adultery and fornication, evidence that the general reputation of defendant's alleged paramour was that of a prostitute, and that the house at which she lived was generally reputed to be a bawdy house, held admissible.—Sutton v State, Ga., 53 S. E. Rep. 381.

6. ADVERSE POSSESSION—Cross Complaint.—Where motion to strike out cross-complaint in an action to foreclose mechanic's lien was withdrawn, it will be assumed on appeal that cross-complainant's claims were properly before the court.—Hughes Bros. v. Hoover, Cal., 84 Pac. Rep. 681.

7. ADVERSE POSSESSION—Necessity for Claim of Title.—The possession of real property to be adverse must be not only actual, open, notorious, and continuous, but also under a claim of right or color of title.—Lohse v. Burch, Wash., 84 Pac. Rep. 722.

8. APPEAL AND ERROR—Affidavits.—Affidavits in the nature of original evidence, attached to the return to an application for *mandamus* to compel the granting of appeal, cannot be considered in the supreme court.—Wenar v. Schwartz, La., 40 So. Rep. 599.

9. APPEAL AND ERROR—Amending Pleadings.—An objection to the allowance of an amendment of the complaint could not be reviewed where it was not shown by bill of exceptions.—Southern Ry. Co. v. Pogue, Ala., 40 So. Rep. 565.

10. APPEAL AND ERROR—Error Favorable to Party Complaining.—A party cannot complain of an instruction more favorable to him than he is entitled to under the evidence.—Southern Cotton Oil Co. v. Spotts, Ark., 92 S. W. Rep. 249.

11. BOUNDARIES—Establishment.—Corners established by the United States surveyors held conclusive as to the actual location of bouudary lines.—Frederitzie v. Boeker, Mo., 92 S. W. Rep. 227.

12. BROKERS—Commissions—A contract to pay real estate agents' commissions held to entitle them to commissions if they produce a purchaser to whom the principal in fact sells.—Bowe v. Gage, Wis., 106 N. W. Rep. 1074.

13. BUILDING AND LOAN ASSOCIATIONS—Change of Plan.—Where a building association suspends for an unreasonable time payment of dues on its stock by its members, working a departure from its general plan, a borrower held not estopped from demanding dissolution of the contract with the association.—Burkheimer v. National Mut. Building & Loan Assn., W. Va., 53 S. E. Rep. 372.

14. COMPROMISE AND SETTLEMENT—Avoidance of Settlement.—Failure of plaintiffs to tender back certain money paid by defendants in effecting a settlement held not to estop plaintiffs from repudiating the settlement for fraud.—Bowe v. Gage, Wis., 106 N. W. Rep. 1074.

15. CONSTITUTIONAL LAW—Equal Protection of Law.—Const. U. S. Amend. 14, prohibiting a denial of equal protection of the laws, does not require equality in the levying of taxes by a state—State v. Wheeler, N. Car., 53 S. E. Rep. 358.

16. CONSTITUTIONAL LAW—Licenses.—Where the legislature has for more than 20 years imposed license taxes on the business of gas, electric, waterworks, telegraph, and telephone companies, its construction of constitution is entitled to great weight.—State v. New Orleans Ry. & Light Co., La., 40 So. Rep. 597.

17. CONTRACTS—Breach.—Where A contracts with B to pay certain notes made by B maturing at different dates, the failure to pay a single note is a breach of the contract.—Thomas v. Richards, Ga., 53 S. E. Rep. 400.

18. CONTRACTS—Conditions Precedent.—Where A contracts with B to pay certain notes made by B, maturing at different dates, the contract is severable, and in an action by B on default of A he would be limited to the amount of the notes matured and unpaid.—Thomas v. Richards, Ga., 53 S. E. Rep. 400.

19. CONTRACTS—Enforcement.—Where a contract to paint and paper a building had been partly performed when the building was burned held that the contractors were entitled to recover for the value of their labor and

materials.—Ganong & Chencweth v. Brown, Miss , 40 So Rep. 556.

20. CONTRACTS—Intention of Parties.—While the form of a contract should be considered as expressive of the intention of the parties, yet when form and substance conflict, the latter controls.—Wilson v. Wilson, Mo., 92 S. W. Rep. 145.

21. CONTRACTS—Unpaid Balances.—In an action for an unpaid balance upon an account for labor, defendant's right to an allowance of a certain sum by reason of plaintiff's failure to properly finish his job was a question for the jury.—Snyder v. Patton & Gibson Co., Mich., 106 N. W. Rep. 1106

22. CORPORATIONS—Franchises.—A corporation organized to maintain a fair, promote agriculture, etc., which merely used its franchise for the purpose of conducting a race course for gambling, held subject to a forfeiture of such franchises for failure to substantially fulfill the same.—State v. Delmar Jockey Club, Mo., 92 S. W. Rep. 185.

23. COSTS—Necessary Disbursements.—The questions as to what record is necessary on appeal and what papers should be filed are exclusively for the supreme court, and a district court has no authority to strike out portions of the transcript.—Montana Ore Purchasing Co. v. Boston & Montana Consol. Copper & Silver Min. Co., Mont, 84 Pac. Rep. 706.

24. COURTS—Original Jurisdiction of Supreme Court.—The supreme court will assume jurisdiction in *certiorari* to review a judgment depriving an election judge of one party of the joint custody of the registration lists and of his share of the official ballots.—People v. District Court, Second Judicial District, Colo., 84 Pac. Rep. 694.

25. CRIMINAL EVIDENCE—Confessions.—Under the express provisions of the code, confessions of accused made under inducement, with all the circumstances, may be given against him, except when made under the influence of fear produced by threats.—State v. Poole, Wash., 84 Pac. Rep. 727.

26. CRIMINAL LAW—Jury.—It is no ground of exception to the ruling sustaining a challenge of the state to a juror, that a defendant was thereby, after having exhausted his challenges, compelled to accept another juror to whom he objected.—Leaptrot v. State, Fla., 40 So. Rep. 616.

27. CRIMINAL TRIAL—Continuance.—Refusal of the court in a criminal prosecution to put the state to the admission of a showing as to what defendant expected to prove by certain alleged absent witnesses for whom no motion for continuance had been made held not error.—Rogers v. State, Ala., 40 So. Rep. 572.

28. CRIMINAL TRIAL—Malicious Prosecution.—An affidavit made the basis of a criminal prosecution is void where it does not aver probable cause for believing that an offense has been committed.—Shannon v. Sims, Ala., 40 So. Rep. 574.

29. CRIMINAL TRIAL—Request to Charge.—In a prosecution for perjury, a charge that a conviction could not be had except on the testimony of two witnesses, or on that of one witness and corroborating circumstances, held not required unless requested.—Scott v. State, Ark., 92 S. W. Rep. 241.

30. CRIMINAL TRIAL—Venue.—Under constitutional provision that a criminal case shall be tried in the county where the offense was committed, one accused of crime has a right to a trial in the county embracing the territory where the offense was committed.—Pope v. State, Ga., 35 S. E. Rep. 384.

31. CRIMINAL TRIAL—Verdict.—Action of the court, on a prosecution for assault with intent to kill, in sending the jury back to make their verdict more explicit, held proper.—Thompson v. State, Miss., 40 So. Rep. 545.

32. DEDICATION—Streets.—Where land was dedicated to a city for street purposes, the city's acceptance was not negatived by the fact that the land was not presently used for street purposes.—City of Meridian v. Poole, Miss., 40 So. Rep. 548.

33. DISORDERLY HOUSE—Reputation of Inmates.—In a prosecution for keeping a disorderly house, an instruction held not prejudicially erroneous as authorizing a conviction if defendant suffered lewd women or men to remain in her house.—State v. Price, Mo., 92 S. W. Rep. 174.

34. DIVORCE—Evidence.—Where in a suit for divorce for adultery the defendant wife reconvened on the same ground, and alleged public defamation, abandonment, and nonsupport, and the evidence clearly showed that defendant was guilty, but also that plaintiff had deserted defendant and her children and had failed to support them, it was error to dismiss plaintiff's demand.—Van Horn v. Arantes, La., 40 So. Rep. 592.

35. DIVORCE—Temporary Alimony.—On petition of a wife against her husband for divorce, a judgment allowing temporary alimony for the support of the children will not be disturbed.—Rochester v. Rochester, Ga., 53 S. E. Rep. 399.

36. EJECTMENT—Petitory Action.—Where a vendee sues for slander of title, and the defendant in such suit brings a petitory action against a plaintiff, and the original vendor of both parties is not a party to either action, he cannot be required by a decree in the petitory action to make a deed.—Barfield v. Saunders, La., 40 So. Rep. 593.

37. ELECTIONS—Registration Lists.—In making copies of registration lists for the use of the election judges, all names known to be fictitious, false, or fraudulent should be omitted.—People v. District Court, Second Judicial Dist., Colo., 84 Pac. Rep. 694.

38. ELECTION OF REMEDIES—Consistency of Remedies.—The recovery of an unsatisfied judgment on notes given for the price of personalty is no bar to a subsequent action for damages for the fraud by which the property was obtained.—Standard Sewing Mach. Co. v. Owings, N. Car., 53 S. E. Rep. 345.

39. EMINENT DOMAIN—Railroad Crossings.—Where a proposed spur track is intended for transfer of freight from industrial plants in a town, the railroad company has the right to expropriate necessary crossings over the spur tracks of another railroad, under Acts 1902, p. 103, No. 74.—Kansas City, S. & G. Ry. Co. v. Louisiana W. R. Co., La., 40 So. Rep. 627.

40. EQUITY—Demurrer.—Demurrer to a bill operates as an admission that all the allegations of the bill which are well pleaded are true, and a demurrer to the whole bill should be overruled if the bill makes any case for equitable relief.—Lindsley v. McIver, Fla., 40 So. Rep. 619.

41. EQUITY—Vague Allegations.—An allegation in a bill which by reason of its uncertainty fails to show materialty of its subject-matter need not be answered.—Burkheimer v. National Mut. Building & Loan Ass'n, W. Va., 53 S. E. Rep. 372.

42. ESTOPPEL—Mutual Estoppel.—It may happen that a plaintiff being estopped to allege a state of facts which the defendant is estopped to deny, the interest of justice will require that both should be liberated.—Ackerman v. Larner, La., 40 So. Rep. 581.

43. EVIDENCE—Burden of Proof.—A party on whom rests the burden of proof must, in order to entitle himself to a finding in his favor, give evidence not only of greater convincing power, but such as to convince the jury of the truth of his contention.—Anderson v. Chicago Brass Co., Wis., 106 N. W. Rep. 1077.

44. EVIDENCE—Judicial Notice.—Courts will take judicial notice of the distance between station towns on a certain railroad.—A. F. Johnson & Son v. Atlantic Coast Line R. Co., N. Car., 53 S. E. Rep. 362.

45. EVIDENCE—Judicial Notice.—The supreme court will not take judicial notice that a racing association has paid over a certain fund for the making of agricultural exhibitions at the state fair when no such exhibitions were held by the association.—State v. Delmar Jockey Club, Mo., 92 S. W. Rep. 185.

46. EVIDENCE—Verbal Admissions.—The rule that ver-

bal admissions are to be received with caution is especially true when the witnesses testified long after the event.—Ladd v. Lookout Distilling Co., Ala., 40 So. Rep. 610.

47. EXECUTORS AND ADMINISTRATORS—Costs of Accounting.—The executrix of a deceased executor held not to be personally charged with the costs of proceedings to compel her to account as to the estate of which her testate was executor.—*In re* Walton, 98 N. Y. Supp. 42.

48. FIRE INSURANCE—Effect of Retention of Proofs of Loss.—The retention of proofs of loss furnished by an insured to the insurer does not amount to a waiver of a forfeiture of a policy arising under a provision of the policy that it shall be void if with the assent of the insured foreclosure proceedings are commenced.—Woodard v. German American Ins. Co., Wis., 106 N. W. Rep. 681.

49. FISH—Rights of Fishery.—Const. art. 16, §§ 5, 6, declaring natural streams property of the public, and that the right to divert same to beneficial uses shall never be denied, held to afford no justification for trespass by one man on land of another in pursuing right of fishery.—Hartman v. Tresise, Colo., 84 Pac. Rep. 685.

50. FRAUDS, STATUTE OF—Debt of Another.—Where, after goods had been sold to a third person for whom defendant K had agreed to answer, K agreed to pay for the goods in consideration of the release of his property from attachment, such promise was not within the statute of frauds.—Kalispell Liquor & Tobacco Co. v. McGovern, Mont., 84 Pac. Rep. 709.

51. FRAUDS, STATUTE OF—Sale and Delivery.—The statute of frauds, requiring delivery and acceptance to make a parol sale of chattels valid, cannot be overcome by a custom as to what shall constitute delivery. — Calvert v. Schultz, Mich., 106 N. W. Rep. 1123.

52. GAMING—Pool Selling.—Acts 1895, p. 8, § 40, appropriating money received by the state from pool selling and bookmaking, held to estop the state to deny the validity of Rev. St. 1899, § 7419, and to forfeit the franchise of a corporation because engaged in such business.—State v. Delmar Jockey Club., Mo., 92 S. W. Rep. 185.

53. GIFTS—Onerous Donation.—A manual gift may be free, onerous, or remunerative, and when the donor makes such a gift, *omnium bonorum*, on condition that the donee shall maintain him for the rest of his life, it will be dealt with as an onerous donation, and not as a commutative contract.—Ackerman v. Larner, La., 40 So. Rep. 581.

54. GUARANTY—Pleading.—Where plaintiff sued K for goods sold, no recovery could be had on a contract by K to pay for the goods after they were sold and delivered to a third person in consideration of the release of his property from attachment.—Kalispell Liquor & Tobacco Co. v. McGovern, Mont., 84 Pac. Rep. 709.

55. GUARDIAN AND WARD—Charges.—One furnishing lodging and care for children without intent to charge therefor held not entitled to charge therefor on accounting as their guardian.—Abrams v. United States Fidelity & Guaranty Co., Wis., 106 N. W. Rep. 1091.

56. HIGHWAYS—Obstruction.—Where plaintiff was injured by an obstruction in a roadway negligently placed there by defendant railroad company, knowing that the way was commonly used by the public, defendant was liable whether the roadway was a public highway or not.—San Antonio & A. P. Ry. Co. v. Wood, Tex., 92 S. W. Rep. 259.

57. HOMICIDE—Self-Defense.—Self defense is extended to the defense of the person and the domicile.—Reed v. State, Neb., 106 N. W. Rep. 649.

58. HUSBAND AND WIFE—Contracts of Wife.—A married woman living in community with her husband may be held liable on contracts made by her which inure to her separate benefit when to hold otherwise would be to enable her to perpetrate a fraud. — Ackerman v. Larner, La., 40 So. Rep. 581.

59. HUSBAND AND WIFE—Contracts of Wife.—A married woman may on her own responsibility borrow money to pay a debt of her husband and give her note therefor, and the contract is binding on her.—Rood v. Wright, Ga., 53 S. E. Rep. 390.

60. HUSBAND AND WIFE—Enticing and Alienating.—In an action by a wife against her husband's father for enticing away her husband, evidence of a divorce suit by the husband participated in by the father was admissible.—Hardwick v. Hardwick, Iowa, 106 N. W. Rep. 639.

61. HUSBAND AND WIFE—Failure to Support Wife.—A husband must provide for the reasonable support of his wife, and, when without just cause he fails to provide such support, she may sue him for reasonable maintenance.—Price v. Price, Neb., 106 N. W. Rep. 657.

62. HUSBAND AND WIFE—Separate Estate.—A married woman who has engaged in trade as her husband's partner may bind her interest in the firm property by joining with her husband in a chattel mortgage to secure a firm debt.—Hackley Nat. Bank v. Jeannot, Mich., 106 N. W. Rep. 1121.

63. INJUNCTION—Grant on Conditions.—Where complainants alleged that machinery which is a part of the land owned by them has been illegally levied on and sold in attachment against the former owner of the land, and prayed for an injunction and that the sale be annulled and that the property if removed be restored, and failed to give bond to make effective the injunction allowed, a decree dismissing the bill without prejudice will not be disturbed.—Summers v. First Nat. Bank, Fla., 40 So. Rep. 622.

64. INSURANCE—Change in Interest.—The word "interest" in an insurance policy applies only where insured owns and insures an interest less than title.—Garner v. Milwaukee Mechanics' Ins. Co., Kan., 84 Pac. Rep. 717.

65. INTOXICATING LIQUORS—What Constitutes Sale.—Delivery of whisky on presentation of slip with accused's name together with the price of the whisky held a sale within the liquor law.—Bennett v. State, Miss., 40 So. Rep. 554.

66. JUDGMENT—Petitory Action.—Where, in a petitory action brought between vendees of land under different contracts with the owner, a judgment is rendered for the defendant, it is of itself title to the land.—Barfield v. Saunders, La., 40 So. Rep. 593.

67. JURY—Selection by Sheriff.—Where a jury was summoned for each of four or five weeks of a term by jury commissioners, but no jury was summoned for the sixth week of the term, a jury was properly summoned for that week by the sheriff.—Davis v. State, Tex., 92 S. W. Rep. 256.

68. JURY—Waiver of Objections.—Where after conviction the competency of a juror is challenged, that counsel for accused failed to examine the juror in that respect is a waiver of the objection.—Reed v. State, Neb., 106 N. W. Rep. 649.

69. LANDLORD AND TENANT—Notice to Quit.—Notice to quit from landlord to tenant, under Comp. Laws 1897, § 8347, should be sufficiently definite to inform the tenant of the meaning of the notice, but it is not indispensable that it should be signed by the landlord.—Lund v. Ozanne, N. M., 84 Pac. Rep. 710.

70. LIBEL AND SLANDER—Burden of Proof.—Where a publication is libelous *per se*, the burden is on the defendant to overcome the presumption of a falsity, malice, and damage, otherwise plaintiff must prove special damage.—Sheibley v. Ashton, Iowa, 106 N. W. Rep. 618.

71. LIBEL AND SLANDER—Defenses.—Where defendant in slander charged plaintiff with larceny, it was no defense that plaintiff had in fact not committed the crime, when those who heard the slander did not know the circumstances.—Lee v. Crump, Ala., 40 So. Rep. 609.

72. LIBEL AND SLANDER—Judicial Proceedings.—Statements by defendant as a witness before a grand jury and to a district attorney pending investigation of an alleged offense against plaintiff held privileged. — Schultz v. Strauss, Wis., 106 N. W. Rep. 1065.

73. LICENSES—Electric Light Company.—An electric light company is not a manufacturer and exempt, under Const. art. 229, authorizing the legislature to impose

license taxes.—State v. New Orleans Ry. & Light Co., La., 40 So. Rep. 597.

74. LICENSES — Ticket Brokers. — A city ordinance licensing ticket brokers and requiring a certificate of membership in some reputable ticket brokers' association held void for unreasonableness.—Munson v. City of Colorado Springs, Colo., 84 Pac. Rep. 683.

75. LIFE INSURANCE—Presumption of Death from Absence.—Where, in an action on a life policy, the question was whether the assured, who had not been heard from for over seven years, was dead, it was not error to exclude mortality tables.—Heagany v. National Union, Mich., 106 N. W. Rep. 700.

76. LIMITATION OF ACTIONS—Gifts.—Where a donation *omnium bonorum* is made on the condition that the donee shall board the donor and furnish him with pocket money, every payment made in fulfillment of the condition of the donation, as also the very presence of the donor in the house of the donee as a boarder, operates as an interruption of the prescription of the action of the donor for the return of the money.—Ackerman v. Larner, La., 40 So. Rep. 581.

77. LIMITATION OF ACTIONS—Mortgaged Property.—Wrongful removal of timber from mortgaged land, impairing the security of a second mortgagee, held to start limitations against the second mortgagee's right of action therefor, though his mortgage had not matured.—Jenks v. Hart Cedar & Lumber Co., Mich., 106 N. W. Rep. 1119.

78. MALICIOUS PROSECUTION—Ratification of Act.—A person who authorizes or ratifies the act of another in making a void affidavit as the foundation of a criminal prosecution is liable in an action for malicious prosecution.—Shannon v. Sims, Ala., 40 So. Rep. 574.

79. MASTER AND SERVANT—Assumption of Risk.—The defense of assumption of risk in an action for injuries to a servant rests on contract arising from the contract of employment that he will assume the ordinary risks of the service.—Choctaw, O. & G. R. Co. v. Jones, Ark., 92 S. W. Rep. 244.

80. MASTER AND SERVANT—Evidence as to Negligence.—In an action for injuries to a fireman in collision between his train and another, evidence held not to show negligence on the part of the train dispatcher, rendering the railroad company liable.—Moon v. Pere Marquette R. Co., Mich., 106 N. W. Rep. 715.

81. MASTER AND SERVANT — Failure to Warn Against Danger.—In an action for injuries received by an employee while operating a machine, the question whether the employer was negligent in failing to warn the employee of the danger held for the jury.—Anderson v. Chicago Brass Co., Wis., 106 N. W. Rep. 1077.

82. MASTER AND SERVANT—Incompetency of Servant.—Incompetency of a servant held to mean want of ability suitable to the work either as regards natural qualities or experience, or deficiency of disposition to use one's ability and experience properly.—Hamann v. Milwaukee Bridge Co., Wis., 106 N. W. Rep. 1081.

83. MASTER AND SERVANT—Injuries to Servant.—In a suit for personal injuries by an employee, a nonsuit should be refused unless the evidence reasonably leads to the conclusion that plaintiff was negligent. — Central of Georgia Ry. Co. v. Harper, Ga., 53 S. E. Rep. 391.

84. MASTER AND SERVANT—Loan of Servant to Third Person.—Where an employer lends his employee to a third person for a particular employment, the employee for anything done in the particular employment is the employee of the third person.—Wiest v. Coal Creek R. Co., Wash., 84 Pac. Rep. 725.

85. MASTER AND SERVANT—Obvious Danger.—The danger of an employee receiving an electric shock while clearing snow from an elevated railroad track held not an obvious danger.—Smith v. Manhattan Ry. Co., 98 N.Y. Supp. 1.

86. MINES AND MINERALS—Adverse Claims. — Under Code Civ. Proc., § 275, an owner of an interest in a mining claim who has been excluded by his co-owner from an application for a patent may adverse or protest such application, and maintain an action in support thereof.—Davidson v. Fraser, Colo., 84 Pac. Rep. 695.

87. MUNICIPAL CORPORATIONS—Assignments of Money Due on Contract.—An assignment of money due from a city on a contract held not in violation of a provision of the city charter that no contract for the doing of any public work shall be assigned or transferred, except by operation of law.—Dickson v. City of St. Paul, Minn. 106 N. W. Rep. 1053.

88. MUNICIPAL CORPORATIONS—Board of Police Commissioners.—Where a rule adopted by a board of police commissioners provided that any member of the police department neglecting to pay a debt should be punished, the board were not required to wait until a court had passed on the question of indebtedness before taking action against an officer.—Cleu v. Board of Police Comrs., Cal., 84 Pac. Rep. 672.

89. MUNICIPAL CORPORATIONS—Improvements. — Under charters which give power to cities to impose special assessments for a street improvement only upon competitive bids, cities have no power to adopt a patented pavement so controlled that there can be no competition.—Allen v. City of Milwaukee, Wis., 106 N. W. Rep. 1099.

90. MUNICIPAL CORPORATIONS—Obstruction of Alley.—Defendant could not be convicted under an ordinance of obstructing an alley in the absence of any showing that the alley was ever opened, used, or worked by the city authorities.—People v. McNamara, Mich., 106 N. W Rep. 698.

91. MUNICIPAL CORPORATIONS—Police Officers. — The police system of the city of St. Louis having been regulated by the state law, it was not within the power of the framers of the city scheme and charter to vest the city police officers with powers inconsistent with those given by the general laws.—State v. Stobie, Mo., 92 S. W. Rep. 191.

92. MUNICIPAL CORPORATIONS—Operation of Lighting Plant.—Operation of an electric light plant by a city held not a purely public function, so as to exempt it from liability for the negligence of its agents and officers in operating the plant.—Fisher v. City of Newbern, N. Car., 53 S. E. Rep. 342.

93. NAVIGABLE WATERS—Title of State.—State held to have no property in the waters of Niagara river within Const. art. 8, § 20, prohibiting appropriation of public property to private use without the assent of two-thirds of the members of the legislature.—Niagara County Irrigation & Water Supply Co. v. College Heights Land Co., 98 N. Y. Supp. 4.

94. NEGLIGENCE—Dangerous Premises.—The proprietor of premises used for business owes a duty to customers to keep the sames reasonably safe, or to warn customers of any danger known to such proprietor and unknown to the customer.—Shaw v. Goldman, Mo., 92 S. W. Rep. 165.

95. NEGLIGENCE—Injury to Licensee.—Where plaintiff entered the premises of the defendant railroad company as a volunteer and licensee, and fell and was injured, the railroad company was not liable.—Jenkins v. Central of Georgia Ry. Co., Ga., 53 S. E. Rep. 379.

96. NEGLIGENCE — Submission of Issues to Jury. — Where a court can see testimony from which a probability can legitimately arise in favor of plaintiff suing for death negligently inflicted, the cause should be submitted to the jury. — Powers v. Pere Marquette R. Co., Mich., 106 N. W. Rep. 1117.

97. OFFICERS—Board of Pharmacy.—A member of the state board of pharmacy held not liable for failure of that body to register plaintiff as a pharmacist without examination or the exhibition of a diploma.—Monnier v. Godbold, La., 40 So. Rep. 604.

98. PLEADING—Amendment.—An amended complaint, alleging a cause of action for equitable relief, held not objectionable as stating a different cause of action from that alleged in the original complaint.—North Side Loan & Building Soc. v. Nakielski, Wis., 106 N. W. Rep. 1097.

99. PROHIBITION—Grounds.—That members of a city

police force had authority as private citizens to forcibly enter a racing association's inclosure to arrest gamblers held no ground for the issuance of prohibition to restrain a justice from assuming jurisdiction of a criminal proceeding against such policemen for breaking such inclosure.—State v. Stobie, Mo., 92 S. W. Rep. 191.

100. PROHIBITION—Scope of Writ.—A writ of prohibition held not maintainable to restrain the court having jurisdiction from placing defendants on trial a second time for an offense for which they had once been put in jeopardy.—State v. Williams, Mo., 92 S. W. Rep. 151.

101. QUO WARRANTO—Misuse of Corporate Franchise.—A corporation may be proceeded against by *quo warranto* for misuse or perversion of its franchises, notwithstanding its officers and agents may also be amenable to the criminal law for the offense complained of.—State v. Delmar Jockey Club, Mo , 92 S. W. Rep. 185.

102. RAILROADS—Fires.—In an action against a railroad company for setting fire to plaintiff's factory by sparks from an engine, testimony that a car on the same train on the following day was on fire was not admissible.—A. F. Johnson & Son v. Atlantic Coast Line R. Co., N. Car., 52 S. E. Rep. 362.

103. RAILROADS—Injury to Animals.—In an action against a railroad company for the killing of plaintiff's horse, evidence held to require submission of the question of defendant's negligence to the jury.—Southern Ry. Co. v. Pogue, Ala., 40 So. Rep. 565.

104. REVIEW—Breach of Contract.—Where a contract for the sale of tobacco provided for delivery and receipt on July 1st by plaintiffs, they could not recover the tobacco thereafter without proving readiness to perform on that day.—Hughes v. Knott, N. Car., 53 S. E. Rep. 361.

105. STREET RAILROADS—Passenger Jumping to Avoid Collision.—A passenger injured by jumping from a moving street car to avoid an apparently impending accident held not precluded from recovering.—McManus v. Metropolitan St. Ry. Co., Mo., 92 S. W. Rep. 176.

106. STREET RAILROADS—Place for Alighting.—It is the duty of persons operating a street car to know that the place at which the car is stopped to allow a passenger to alight is reasonably safe, and the passenger has a right to assume that it is safe, unless it is obviously dangerous.—Mobile Light & R. Co. v. Walsh, Ala., 40 So. Rep. 559.

107. SUBROGATION — Subsequent Mortgagees. — Mortgagee in a mortgage the proceeds of which had been used to pay off another mortgage held entitled to be subrogated to the lien of the latter.—Ligon v. Barton, Miss., 40 So. Rep. 555.

108. TAXATION—Tax Sale.—Where the various descriptions belonging to a landowner were separately sold for taxes, the amount paid for each description must be given in the notice of sale.—Jackson v. Mason, Mich., 106 N. W. Rep. 1112.

109. TIME—Bill of Exceptions.—Where time was extended for the signing of a bill of exceptions until the 22d day of December, 1905, the time within which it could be legally signed expired on the 21st.—Heal v. State, Ala., 40 So. Rep. 571.

110. TRIAL—Applicability of Instruction to Case.—In a trial for enticing away a husband, an instruction on defendant's preventing a reconciliation, not supported by the pleadings or evidence, was erroneous.—Hardwick v. Hardwick, Iowa, 106 N. W. Rep. 639.

111. TRIAL—Contract for Sale of Land.—Where, under a contract for the sale of realty, the purchaser, who was in possession, on the payment of the price was to become the owner, and made a first payment, a subsequent sale by the vendor to another was illegal.—Barfield v. Saunders, La., 40 So. Rep. 593.

112. TRIAL—Instructions on Attorney's Letter Heads.—That the charges given at the instance of a party are written on a piece of paper on which is printed the name of one of his attorneys is not a ground for reversal.—Anthony v. Seed, Ala., 40 So. Rep. 577.

113. TRIAL—Mental Incompetency of Plaintiff.—Where defendant moves to dismiss on the contention that the evidence showed plaintiff to be mentally incompetent, and the evidence is not conclusive, the court properly refers this issue of fact to the jury.—Central of Georgia Ry. Co. v. Harper, Ga., 53 S. E. Rep. 391.

114. TRUSTS—Capital and Income.—As between life beneficiary and remainderman, the former held entitled to a certain dividend on stock.—Robertson v. DeBrulatour, 98 N. Y. Supp. 15.

115. TRUSTS—Capital and Income.—A remainderman held not entitled to call on the life tenant to create a sinking fund out of the income for the purpose of reimbursing the estate for premiums paid for bonds in which a portion of the principal was invested.—*In re* Stevens, 98 N. Y. Supp. 28.

116. TRUSTS—Liability for Rents and Profits.—Where the naked legal title to real estate is held by persons receiving the rents and profits thereof, the beneficial owners on enforcing the trust are entitled to judgment for the rents and profits.—Percival-Porter Co. v. Oakes, Iowa, 106 N. W. Rep. 626.

117. TRUSTS—Trust Property.—Where property was conveyed to trustees, on the death of one of them the property vested in the survivors, and on the death of such survivors their successors might be appointed by the clerk of the court, under Revisal 1905, § 1037.—Thornton v. Harris, N. Car., 53 S. E. Rep. 841.

118. TURN PIKES AND TOLL ROADS—Termination of Charter.—On the expiration of the charter rights of a toll road company the road vested in the public, and the subsequent conveyance of the rights and franchises of the corporation gave the grantee no right to exact tolls.—State v. Louisiana, B. G. & A. Gravel Road Co., Mo., 92 S. W. Rep. 153.

119. WATERS AND WATER COURSES—Partial Invalidity of Franchise.—The valid part of a contract of a city granting a waterworks franchise held enforceable, notwithstanding an invalid attempt to make the franchise exclusive.—City of Gadsden v. Mitchel , Ala., 40 So. Rep. 557.

120. WEAPONS—Joint Tort Feasors.—Where defendants were shooting at a mark by turns with a rifle when plaintiff was injured, they were joint tort-feasors, and plaintiff was therefore not bound to prove which one of them injured him.—Benson v. Ross, Mich., 106 N. W. Rep. 1120.

121. WEAPONS—Shooting into Dwellings.—Where on a charge of shooting into a dwelling house, prosecution has shown that the motive of accused was to get rid of a negro camp, defendant may show that a notice had been served on the occupant of the house that the negro camp must go.—State v. Nugent, La., 40 So. Rep. 581.

122. WILLS—Mental Weakness.—Although mere weakness of mind does not generally incapacitate a person from making testamentary disposition of his property, yet he cannot dispose of property, the possession of which he but barely appreciates, among parties whose relations he knows, but does not understand; but, if he has the requisite mental capacity, he may make either a will or a deed as eccentric, injudicious, or unjust as caprice, frivolity, or revenge can dictate.—Schneider v. Vosburgh, Mich., 106 N. W. Rep. 1129.

123. WITNESSES—Examination.—Where there are several counsel, the court may limit to one counsel the examination of each witness.—State v. Nugent, La., 40 So. Rep. 581.

124. WORK AND LABOR—Labor and Materials Furnished.—A builder held entitled to recover for labor and materials furnished under a special contract, though not amounting to performance, if the work was accepted either expressly or by necessary implication.—Higgins Mfg. Co. v. Pearson, Ala., 40 So. Rep. 579.

125. WORK AND LABOR—Persons in Family Relation.—Where near relatives live together as members of the same family, and services are performed by one for the other, it is presumed that no charge will be made therefor.—Key v. Harris, Tenn., 92 S. W. Rep. 235.